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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

KRIM M. BALLENTINE	)	
Plaintiff,	)	
v.	)	**Civ. No. 1999-130**
UNITED STATES OF AMERICA,	)	
Defendant.	)	

ATTORNEYS:

Krim M. Ballentine, *pro se*
St. Thomas, U.S.V.I.
For the plaintiff,

AUSA Joycelyn Hewlett
St. Thomas, U.S.V.I.
For the defendant.

MEMORANDUM

Moore, J.

In this action, Krim M. Ballentine ["plaintiff"], a United States citizen residing in St. Thomas, Virgin Islands, asks the Court to declare the Revised Organic Act of 1954[1] null and void as an unconstitutional exercise of Congressional power. According to the plaintiff, Congress's Article IV power to enact "needful rules and regulations respecting the Territory" does not include any authority to confer citizenship on persons born in

[1] *See* 48 U.S.C. §§ 1541-1645 (codified as amended). The complete Revised Organic Act of 1954 is available at V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, & U.S. Constitution (1995 & Supp. 2001) (preceding V.I. CODE ANN. tit. 1).

the Virgin Islands after it became a United States possession. *See* 8 U.S.C. § 1406 (purporting to grant United States citizenship on persons born in the Virgin Islands). He argues that the Constitution alone confers citizenship on persons born in the Virgin Islands, and Congress exceeded its powers to purport to grant citizenship to persons born in the United States. The plaintiff further argues that Congress's Article IV power does not include any continuing and unilateral authority to determine the extent of the constitutional rights of United States citizens residing in the Virgin Islands. Finally, he contends that, as a citizen of the United States residing in an organized territory of the United States, he has been denied his constitutional right to a regular voting representative in Congress and his right to vote in presidential elections.

The United States has moved to dismiss, taking the position that, in enacting the Revised Organic Act of 1954, Congress acted pursuant to the authority vested in it by Article IV of the Constitution, and that citizens of the United States residing in an "unincorporated" territory have neither the right to vote in federal elections nor the right to a regular voting representative in Congress. Having carefully considered the parties' submissions and arguments, the Court will order supplemental briefs on issues identified below.

DISCUSSION

Involved here is the fundamental question whether the United States, through laws enacted by Congress, can continue unilaterally to define and delimit the rights of United States citizens residing in this Territory pursuant to Article IV, section 3 of the Constitution, otherwise known as the Territorial Clause. Although the United States takes the unwavering position that the answer to the question is a matter of well-settled law, some background will bring the issues presented into proper perspective.

Structure of the Government Under Danish Rule

In 1917, when the United States purchased the Virgin Islands from Denmark for $25 million, the Danish West Indies was a fully functioning governmental entity, organized under a constitutional monarchy and consisting of separate legislative, executive, and judicial branches set up under a comprehensive Danish "organic act." *See* Colonial Law of Apr. 6, 1906 ["Colonial Law of 1906"](available at V.I. CODE ANN. 1-25, Historical Documents, Organic Acts, and U.S. Constitution (1995) (preceding V.I. CODE ANN. tit. 1)). A brief review of the 85 separate sections of the Colonial Law of 1906 reveals the comprehensive organization of the government of the Danish West Indies at the time of the 1917 transfer, including the three branches of executive, legislative, and judicial government, and a sophisticated bill of rights for

the people of the Danish West Indies, which guaranteed eligible persons the right to vote and a system for elections among other things.

Under the 1906 law, the Danish West Indies were divided into two districts of administration: the district of St. Croix and the district of St. Thomas and St. John, each of which formed a separate municipality governed by a separate colonial council. Colonial Law of 1906 §§ 10, 13. For matters of inter-island mutual interest, each council appointed an equal number of members to form a joint committee. *Id.* § 42. The members of the two colonial councils served four-year terms, with half of the members elected every two years. *Id.* § 17. The Municipality of St. Croix had thirteen members elected by popular vote, in addition to five appointed by the King, for a total of eighteen members from four elective districts: (1) three members elected from the district comprised of Christiansted Town and its suburbs; (2) four members elected from the district of Christiansted country; (3) two members elected from the district of Frederiksted Town; and four members elected from the district of Frederiksted country. *Id.* §§ 14, 15. Similarly, the municipality of St. Thomas and St. John had eleven elected members, in addition to four appointed by the King, for a total of fifteen council members from three elective districts: (1)

eight members elected from the district of Charlotte Amalia; (2) one member elected from the district of St. Thomas country; and (3) two members elected from the district of St. John. *Id.* §§ 14, 16. Legislators were required by law to vote upon their convictions alone and not upon the will of their electors, and could not be called to account outside of Council for statements made in Council. *Id.* § 48.

The two municipalities assessed and collected their own taxes to run local operations, *see id.* § 54, although Denmark took care of central administration, public buildings, and other government operations, *see id.* §§ 49-51. The governor of the Danish West Indies was commander-in-chief of the armed forces in the islands, and had the authority to declare the islands in a state of siege and to exercise unlimited power accordingly. *See id.* § 12.

The franchise or right to vote in the Danish West Indies, like the franchise in the United States at that time, was not universal. The right to vote was vested in every male of at least twenty-five years and unblemished character who was born in or had resided in the Danish Virgin Islands for five years and either owned property of a certain value or had a certain annual income, and who had lived in his elective district for at least

two-and-a-half years. *Id.* § 18.[2]

The judicial branch was also fully organized. The King appointed the judges to exercise their duties under the laws alone, but could not remove them against their wishes unless the court system was altered by law or they were also appointed to perform administrative duties as part of the executive branch of government. *Id.* §§ 9, 69.

The Colonial Law of 1906 further provided for a "bill of rights." For example, the dwelling being "inviolable," there could be no "house-inquisition" or seizure without a warrant from a court of justice. *Id.* § 74. All citizens had the right to assemble together, *id.* § 80, the right to associate in societies without previous permission, *id.* § 79, the right to freely and responsibly publish their thoughts in print, *id.* § 78, the right to practice the religion of their choice, *id.* § 71, the right, if apprehended for "breach of the Laws," to appear before a judge within twenty-four hours after arrest and then to be detained no longer than three days after appearance unless the judge stated

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[2] This limited franchise continued on the books until 1937, when the Organic Act of 1936 eliminated the requirements of male gender, property ownership, and economic stature. *See* Organic Act of 1936 § 17, 49 Stat. 1807 (available at Organic Acts, V.I. CODE ANN. 45, 55 (Equity 1967) (preceding V.I. CODE ANN. tit. 1)); *see also In the Matter of Richardson*, 1 V.I. 301, 1936 U.S. Dist. LEXIS 1093 (D.V.I. 1936) (holding that the Nineteenth and Fifteenth Amendments guaranteed women the right to vote), discussed *infra* at 10-12, 24-29.

reasons for continued custody, the right to immediately appeal an order of custody, and to consult a lawyer regarding an appeal of a custody order after an arrest, *id.* § 73.

The 1906 Colonial Law provided for the welfare of the people of the Virgin Islands. Persons unable to support themselves were "entitled to receive support from the public funds," *id.* § 76, and children whose parents could not afford to provide instruction had a right to instruction in public schools. *Id.* § 77.

Thus, built into the system of governance was a certain amount of autonomy for the people of the Danish West Indies, with Denmark retaining ultimate authority while delegating virtually all day-to-day governance to the governor, his administrators, and the colonial councils for the two municipalities. *See id.* § 2. This semi-autonomous, fully organized system of government Congress encountered in 1917 was then continued as the internal government of the United States Virgin Islands without substantial change for the next twenty years.

Pursuant to the Territorial Clause of Article IV of the Constitution, "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3. Exercising this power in 1917, Congress continued

the existing government, colonial councils, judicial system, and the local laws then in force and effect under the 1906 Colonial Law, "in so far as compatible with the changed sovereignty," providing further that they were to be administered by the same civil officials and through the same judicial tribunals in place as of the date of purchase. *See* Act of Congress, March 3, 1917, ch. 171, § 2, 39 Stat. 1132 (codified at 48 U.S.C. § 1392 (1946) (amended 1948)) (available as amended at V.I. CODE ANN. 39-44, Historical Documents, Organic Acts, & U.S. Constitution (1995) (preceding V.I. CODE ANN. tit. 1)) ["Act of Congress"]. Judicial review of "all cases arising in the said West Indian Islands and now reviewable by the courts of Denmark" was transferred "to the Circuit Court of Appeals for the Third Circuit." *See id.*[3] Ultimate authority that once resided in the King of Denmark was transferred to the President of the United States, and other changes were made to accommodate the existing Danish system to the American system of governance. For the next twenty years, until the Organic Act of 1936 went into effect in 1937, the colonial councils continued to operate, pass laws and govern the United States Virgin Islands.

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[3] This appellate provision of section 2 is quoted in the first case to be appealed from the new Territory of the Virgin Islands and heard by the Circuit Court of Appeals for the Third Circuit. *See Clen v. Jorgensen*, 1 V.I. 497, 500, 265 F. 120, 122 (3d Cir. 1920). This provision, which was deleted in 1948, does not appear in the text of the 1917 act as set forth in the current edition of volume 1 of the Virgin Islands Code.

In 1921, these same, essentially Danish colonial councils promulgated a Code of Laws for each municipality stating the civil and criminal law and procedure, as well as establishing a department of education and the judicial system for the territory. Section 1, Chapter 1, Title I of each these codes provided that the "Judicial power of the Virgin Islands of the United States is hereby declared to be vested in a District Court, Police Courts and Juvenile Courts and a District Court Commissioner." Section 2 provided that the "District Court is a court of general and original jurisdiction in all civil, criminal, admiralty, equity, insolvency and probate matters and causes, unless jurisdiction is conferred on some other court, in which event the jurisdiction of the District Court is concurrent." Sections 3 and 4 provided for three sub-judicial districts and three general terms for the district court. Section 5 provided for the appointment by the governor of a judge for the district court who should hold office for two years and be eligible for reappointment. *See* Ord. Mun. Code St. Croix tit. I, app. Aug. 15, 1921; Ord. Mun. Code St. Thomas & St. John tit. I, app. Dec. 20, 1921.

Chapter 87 of Title III was substantially identical in the codes for both the Municipality of St. Croix and the Municipality of St. Thomas and St. John (titles II, III, IV, and V for each

code were approved July 12, 1920 and March 17, 1921, respectively) and provided for appeals from the police courts to the district court in civil cases. Chapter 37 of Title V of the Codes provided for similar appellate jurisdiction in criminal cases. The 1921 Codes provided the basic law of the Virgin Islands until the Virgin Islands Code was enacted in 1957. The judicial power of the Virgin Islands, as provided in the 1921 Codes, continued to be so vested until 1937.[4]

The Virgin Islands as an Organized Territory

After the United States Virgin Islands had been governed by this Danish-organized, tripartite structure of government for some twenty years, the Congress in 1936 passed an act "to provide a civil government for the Virgin Islands." *See* Organic Act of 1936, 49 Stat. 1807 (available at V.I. CODE ANN. 45-83, Historical Documents, Organic Acts, & U.S. Constitution (Equity 1967) (preceding V.I. CODE ANN. tit. 1)).[5] Even in 1936, Congress continued the Danish-based local laws and ordinances in force on

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[4] *See People of the Virgin Islands v. Price*, 181 F.2d 394, 402 n.4 (3d Cir. 1950) (providing history of Congressional grants of appellate review over Virgin Islands decisions, culminating in the present lodging of that authority in 28 U.S.C. §§ 1291, 1294, as of 1948).

[5] For some unfathomable reason, when Butterworth was the publisher of the Virgin Islands Code, it deleted the full text of the 1936 Organic Act from the historical and reference materials preceding title 1 in the current edition of Volume 1 of the Virgin Islands Code. It is available, however, in the 1967 Equity Publishing Company edition of Volume 1 of the Virgin Islands Code.

the date of enactment and further conferred on the Virgin Islands legislature the power to enact new laws not inconsistent with the laws of the United States. *See* Organic Act of 1936 § 18.[6] The President continued to appoint the governor, and separate, locally elected municipal legislative councils continued for St. Croix and St. Thomas and St. John, joint sessions of which made up the Legislative Assembly to legislate for the Virgin Islands as a whole.[7]

Approximately two months before Congress passed the 1936 Organic Act, this Court[8] held that the Constitution applied to

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[6] The Senate Report on the 1936 Organic Act gives some idea of the intent of Congress: "The inhabitants of the Virgin Islands . . . are capable of managing their local affairs. Unfortunately, the islands are not yet economically self-supporting. Hence it has been necessary to provide for an amount of Federal control over local affairs commensurate with continuing expenditures of Federal funds to subsidize the local government. . . . Matters of purely local concern are placed within local legislative power. The levying of local taxes and the expenditure of local revenue are authorized. It has not been deemed wise to give the local government power to incur bonded indebtedness so long as local revenue is insufficient to pay the entire cost of local government." S. REP. NO. 74-1974, at 2 (1936).

[7] Organic Act of 1936 §§ 5-7, 19, 20, 48 U.S.C. §§ 1405d-f, 1405r-s. The governor could veto any bill of either municipal council or the legislative assembly, and if the legislative body voted to override the veto and the governor still disapproved of the bill, the President of the United States had the final authority to approve or veto the bill. *Id.* § 16, 48 U.S.C. § 1405o.

[8] *See United States v. George*, 625 F.2d 1081, 1088 (3d Cir. 1980) (ruling that the present incarnation of the District Court of the Virgin Islands is a direct descendant from the district court created by the respective colonial councils in the 1921 Codes).

The plaintiff has asserted an additional claim that "Congress has no right to establish a 'less[e]r' or 'inferior' court to the supreme Court for citizens of the United States who happen to reside in the United States possession known as the Virgin Islands[,] as the 'inferior' court establishment intent of the United States Constitution is to handle inferior matters not inferior citizens." (Revised Mot. for Clarification and for Summ.

the Virgin Islands because the Virgin Islands was an organized territory in 1917 when it was acquired from Denmark. *In the Matter of Richardson*, 1 V.I. 301, 1936 U.S. Dist. LEXIS 1093 (D.V.I. 1936). Relying on section 1891 of the Revised Statutes, which was in force at the time the Virgin Islands were acquired, the Court in *Richardson* concluded that the Fifteenth and Nineteenth Amendments applied to the Virgin Islands and prevented the Frederiksted Electoral Board from denying women the right to vote in local elections. *See id.* at 332, 1936 U.S. Dist. LEXIS at *38 ("[T]he Constitution of the United States is operative in the Virgin Islands by force of Congressional enactment.").

Section 1891 of the Revised Statutes stated:

> The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.

Rev. Stat. § 1891 (1875).[9] According to *Richardson*, the Virgin Islands "have been an organized territory of the United States since their acquisition, and . . . they are an organized

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J. at 6.) I read this *pro se* claimant's assertion as an amendment to his complaint alleging that the use of Article IV courts and judges appointed for ten-year terms to handle Article III matters deprives citizens residing in the Virgin Islands of their right to have their cases heard by independent Article III judges appointed for life. The parties and amicus may address this issue, as well as the issues listed at the end of this Memorandum.

[9] Enacted in 1875 and not repealed until 1933, section 1891 was in full force at the time the Virgin Islands were acquired from Denmark in 1917.

territory at the present time." *In the Matter of Richardson*, 1 V.I. at 333, 1936 U.S. Dist. LEXIS at *40 (pointing out that the "complex organization" of Danish rule was "accepted and continued" by Congress by the Act of March 3, 1917[10]). It would follow, then, that section 1891 of the Revised Statutes extended the Constitution to the Virgin Islands as an organized territory. As a result, this Court reasoned, neither Congress nor the territorial legislature could enact any law inconsistent with the Constitution. *See Richardson*, 1 V.I. at 334, 1936 U.S. Dist. LEXIS at *41-42 (citing *Downes v. Bidwell*, 182 U.S. 244, 271 (1901).

In short, this Court ruled in *Richardson* that Congress could neither undo nor supersede section 1891's extension of the Constitution to the Virgin Islands as an organized territory:

> [T]he power which Congress has under the provisions of Article IV, section 3, clause 2 of the Constitution of the United States . . . to govern [the Virgin Islands] must be exercised in accordance with the provisions of the amendments of the Constitution. If there is any conflict between the provisions of Article IV of the Constitution, and the amendments to the Constitution, the provisions in the amendments must control. . . . It must follow, therefore, that the Fifteenth Amendment and the Nineteenth Amendment to the Constitution of the United States . . . control any power which Congress may have, and exercised, under the provisions of Article IV . . . .

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[10] 39 Stat. 1132 (available at V.I. CODE ANN. 39-44, Historical Documents, Organic Acts, & U.S. Constitution (1995) (preceding V.I. CODE ANN. tit. 1)).

See id. at 44-45, 1936 U.S. Dist. LEXIS at *335-36; *see also Hayes v. Government of Virgin Islands*, 11 V.I. 409, 422-23, 392 F. Supp. 48, 50 (D.V.I. 1975) (following *Richardson* to conclude that the Virgin Islands were organized at the time of acquisition and thus section 1891 extended all laws of the United States not expressly inapplicable to the Virgin Islands). This Court concluded that Congress had already fully extended the Constitution to the Virgin Islands through section 1891, while at the same time believing that the Territory was subject to the doctrine of unincorporation.

The Doctrine of Unincorporation

During the years leading up to and following the United States' acquisition of the Danish West Indies, the Supreme Court was developing and refining a new doctrine to deal with the question whether the Constitution applied in United States territories by its own force. In an infamous series of cases known as the *Insular Cases*, the Supreme Court resolved the question whether the Constitution automatically applied or "followed the flag" to protect and govern persons residing in territories acquired by the United States during its expansionist period before and after the Spanish-American war. The solution, arrived at by the same Court that gave us the now-repudiated and overruled "separate but equal" doctrine in *Plessy v. Ferguson*,

163 U.S. 537 (1896), was to construct a new category of American constitutional jurisprudence, the previously unknown doctrine of the "unincorporated" territory. *See Downes v. Bidwell*, 182 U.S. 244 (1901)(White, J., concurring); *see also Balzac v. Porto Rico*, 258 U.S. 298 (1922).[11]

The unincorporation doctrine, simply put, holds that the Territorial Clause confers on Congress plenary power over territories that have not yet been "incorporated" into the United States. This purely unilateral power of Congress is checked only by "fundamental restrictions," which apparently are not necessarily even expressed in the Constitution. As stated by Justice Brown in *Downes v. Bidwell*, "[t]here are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes

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[11] Also known as the *Insular Tariff Cases*, nine Supreme Court cases decided in 1901 make up the core *Insular Cases*: *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Crossman v. United States*, 182 U.S. 221 (1902); *Dooley v. United States*, 182 U.S. 222 (1901) (*Dooley I*); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901) (*Dooley II*); and *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901). A second set of cases, decided between 1903 and 1914, further developed the *Insular Cases*: *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Gonzales v. Williams*, 192 U.S. 1 (1994); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Mendezona v. United States*, 195 U.S. 158 (1904); *Rassmussen v. United States*, 197 U.S. 516 (1905); *Trono v. United States*, 199 U.S. 521 (1905); *Grafton v. United States*, 206 U.S. 333 (1907); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Kopel v. Bingham*, 211 U.S. 468 (1909); *Dowdell v. United States*, 221 U.S. 325 (1911); *Ochoa v. Hernandez*, 230 U.S. 139 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914). The series culminated in 1922 with *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

to give them effect or to secure dependencies against legislation manifestly hostile to their real interests." 182 U.S. at 280. According to the Supreme Court, only those provisions of the Constitution that are essential, or "fundamental," apply automatically to so-called unincorporated territories; merely "artificial or remedial rights," such as the right to trial by jury in both criminal and civil trials or the right to indictment by grand jury, do not automatically extend to unincorporated territories. *See id.* at 282-83; *Dorr v. United States*, 195 U.S. 138, 149 (1904).[12] It is only through the exercise of its Article IV power to regulate territories that the Congress confers such "non-fundamental," "artificial," or "remedial" rights upon citizens inhabiting an unincorporated territory.

This wholly judge-made doctrine of unincorporation was first advanced in a concurring opinion by Justice White in *Downes v. Bidwell*. By 1922, Justice White's reasoning had been fully adopted by the Court. *See Balzac*, 258 U.S. at 305 ("[T]he Dorr

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[12] The Court concluded that

> the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.

Dorr, 195 U.S. at 149.

case shows that the opinion of Mr. Justice White of the majority, in Downes v. Bidwell, has become the settled law of the court."). In *Balzac*, the Court concluded finally that "[i]t is the locality that is determinative of the application of the Constitution . . . and not the [citizenship] status of the people who live in it." *Balzac*, 258 U.S. at 309 ("[A] citizen of the United States living in Porto Rico cannot there enjoy a right of trial by jury under the federal constitution" because such right is not a fundamental right). *But see Duncan v. Louisiana*, 391 U.S. 145, 149 (1958) (right to trial by jury is a fundamental due process right incorporated into the Fourteenth Amendment and applicable to the states). Thus *Balzac* solidified the truly amazing concept that the bundle of rights of citizenship grows and diminishes as the citizen travels from one location to another within the physical geographic boundaries of the United States of America!

Having announced this doctrine of unincorporated territories, the Supreme Court and courts of appeals have continued, in knee-jerk fashion, to reiterate and apply this wholly judge-crafted doctrine to justify the unequal treatment of citizens based solely upon where they live in the United States. *See Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955) (applying the doctrine of unincorporated territories to void the divorce law passed by the Virgin Islands Legislative Assembly

under the Organic Act of 1936); *see also United States v. Verdug-Urguidez*, 494 U.S. 259, 268 (1990) (reaffirming its decisions in the *Insular Cases*, although in the context of aliens in foreign nations); *United States v. Hyde*, 37 F.3d 116, 120 (3d Cir. 1994).

Not surprisingly, the *Insular Cases* have been, and continue to be, severely criticized as being founded on racial and ethnic prejudices that violate the very essence and foundation of our system of government as embodied in the Declaration of Independence and repeated in such documents as the Gettysburg Address and the Civil Rights laws. *See Reid v. Covert*, 354 U.S. 1, 13 (1957) ("[I]t is our judgment that neither the cases nor their reasoning should be given any further expansion.");[13] *Downes v. Bidwell*, 182 U.S. at 380 (Harlan, J., dissenting)("The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies -- the people inhabiting them to enjoy only such rights as Congress chooses to accord to them -- is wholly inconsistent with the spirit and genius as well as with the words of the

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[13] The Court in *Reid v. Covert* went on to state:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.

354 U.S. at 13.

Constitution."); *see also, e.g.*, Christina Duffy Burnett, *Preface to* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION xiv (Christina Duffy Burnett & Burke Marshall eds. 2001) (describing as an "'utterly revolting' situation" that the "United States continues to exercise sovereignty over people (now its own citizens) denied equal membership in the Union" (quoting Justice Harlan's dissenting opinion in *Dorr v. United States*, 195 U.S. at 155)); WILLIAM W. BOYER, AMERICA'S VIRGIN ISLANDS: A HISTORY OF HUMAN RIGHTS AND WRONGS 102-03 (1983) ("[I]t is paradoxical that the principles of the Declaration of Independence and the basic human rights of the Constitution could be denied through the application of . . . an obscure doctrine . . . invented by the Supreme Court."); Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225 (1996) ("The conceptual scheme of the Insular Cases is entirely incompatible with any notion of self-determination.").

In its motion to dismiss, the United States would reject as "specious" the plaintiff's efforts to question the inferior and unequal nature of United States citizenship in the Virgin Islands. (*See* Mem. Supp. Mot. to Dismiss at 10.) I am not willing to override so cavalierly the plaintiff's sensibilities, for I share them. A key aspect of this diminished citizenship is that citizens residing in the Virgin Islands have no voice in

formulating Congressional legislation or in electing the executive whose agencies and programs directly affect our lives. *See Igartua de la Rosa v. United States*, 229 F.3d 80, 84 (1st Cir. 2000) (reaffirming its earlier holding that "citizens resident in Puerto Rico do not have a right to vote in presidential elections because Puerto Rico is not entitled under Article II to choose electors for the President" (internal quotation omitted)); *id.* at 88 (Torruella, J., concurring) (concurring in the result as a matter of explicit language contained in Article II, but noting that "[t]he United States citizens residing in Puerto Rico to this day continue to have no real say in the choice of who, from afar, really govern them, nor as to the enactment, application, and administration of the myriad of federal laws and regulations that control almost every aspect of their daily lives"); *see also Igartua de la Rosa v. United States*, 113 F. Supp. 2d 228, 240 (D.P.R. 2000) ("If the Twelfth Amendment [election of president and vice president by "elector"] were to be read so strictly to only include States, the Constitutional right to participate in Presidential elections would be sabotaged by the Constitution itself."), *rev'd* 229 F.3d 80 at 84.

In bringing this action, Mr. Ballentine reminds us that the nature and extent of the citizenship of residents of the Virgin

Islands have been controlled up to now by a thoroughly ossified set of cases marked by the intrinsically racist imperialism of a previous era of United States colonial expansionism. Those who may not realize the extent to which the current status of the Virgin Islands depends on an entirely repugnant view of the people who inhabited the Virgin Islands at the time of their acquisition are invited to read the *Insular Cases*. For now, I simply highlight those sentiments:

> If those possessions are inhabited by *alien races*, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them.

Downes v. Bidwell, 182 U.S. at 286-87 (Brown, J.) (emphasis added). Other statements confirm the xenophobic sentiments underlying the origins of the unincorporation doctrine:

> We are also of the opinion that the power to acquire territories by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the 'American Empire'. There seems to be no middle ground between this position and the doctrine that if these inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunity of citizens. If such be their *status*, the consequences will be extremely serious.

Id. at 279 (Brown, J.) (emphasis in original).

> It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quitted unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.

Id. at 282 (Brown, J.).

On the right to jury trial in the Philippines, the Court observed:

> If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice.

Dorr v. United States, 195 U.S. at 148 (The reservation of the right to trial by jury from the "bill of rights" accorded the Philippines, "was doubtless due to the fact that the civilized portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were

wholly unfitted to exercise the right of trial by jury."). The *Dorr* Court quoted with approval a gloss on Congress's power over the territories under Article 4, section 3:

> "The practice of the government, originating before the adoption of the Constitution, has been for Congress to establish governments for the territories; whether the jurisdiction over the district has been acquired by grant from the states, or by treaty with a foreign power, Congress has unquestionably full power to govern it; and the people, except as Congress shall provide for, are not of right entitled to participate in political authority until the territory becomes a state. Meantime *they are in a condition of temporary pupilage and dependence*; and while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined." Cooley, Principles of Const. Law, 164.

Id. (emphasis added). Notice that the condition of "pupilage and dependence" was to be temporary!

Moreover, not one of the *Insular Cases* specifically deals with the nature of the relationship of the Virgin Islands with the United States; yet, their aggregate reasoning has controlled, and continues to control, decisions relating to the Virgin Islands. *See Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955); *see also Soto v. United States*, 1 V.I. 536, 273 F. 628 (3d Cir. 1928) (concluding that the Virgin Islands were an unincorporated territory to which the *Insular Cases* applied); *Rivera v. Government of the Virgin Islands*, 375 F.2d 988 (3d Cir.

1967) (citing the *Insular Cases* to state that "it is settled" that the Fifth Amendment right to a grand jury indictment does not govern a prosecution for offenses against the Virgin Islands "without Congressional approval"); *United States v. Hyde*, 37 F.3d 116, 120 (3d Cir. 1994)(citing *Downes v. Bidwell* for authority that Congress has the power to establish a one-way border between the Virgin Islands and the rest of the United States and conduct custom searches there without probable cause); *Government of the Virgin Islands v. Rijos*, 285 F. Supp. 126 (D.V.I. 1968)(citing *Rivera* to hold that the Fifth Amendment right to a grand jury indictment does not apply to a prosecution in the Virgin Islands for offenses against the United States).

Richardson Has Not Been Overruled

In holding that the Constitution applies in full to the Virgin Islands, this Court in *Richardson* was nevertheless able to square its holding with the reasoning of the *Insular Cases* "as summed up in the *Balzac* case." *Id.* at 335, 1936 U.S. Dist. LEXIS at *42. According to the Court in *Richardson*, the *Insular Cases* clearly suggest that section 1891 of the Revised Statutes played a significant role in determining whether Congress intended to extend the Constitution to an unincorporated territory, which in turn evidenced an intent to incorporate. *See Dorr v. United States*, 195 U.S. at 143 (holding that the Sixth Amendment right

to trial by jury in criminal prosecutions did not apply to the Phillippines, proved in part by Congress's express intention that section 1891 would not apply to the Phillippines); *Rassmussen v. United States*, 197 U.S. 516 (1905) (deciding that Alaska, an unorganized territory, was nevertheless an incorporated territory to which the Constitution applied in full, and rejecting the theory that section 1891 allowed Congress to extend the Constitution only to organized territories). Further, the Supreme Court in *Balzac* distinguished *Rassmussen* and its clear suggestion that Congress's extension of the Constitution by statute to an organized territory was a strong indicator of an intent to incorporate that territory and thereby bring to it the full application of the Constitution. The Supreme Court in *Balzac* stated:

> It is true that, in the absence of other and countervailing evidence, *a law of Congress or a provision in a treaty acquiring territory,* declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union, as in the case of Louisiana and Alaska. This was one of the chief grounds upon which this court placed its conclusion that Alaska had been incorporated in the Union, in [*Rassmussen*]. But Alaska was a very different case from that of Porto Rico.

Balzac, 258 U.S. at 309 (emphasis added).[14]

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[14] As exemplified by *Balzac* dealing with the Territory of Puerto Rico, the only way a territory could be fully organized and yet remain unincorporated was if it teemed with "alien races," as did Puerto Rico

Moreover, the question arises whether the language of the treaty or convention by which the United States acquired these islands amounted to such a declaration incorporating the Virgin Islands into the Union:

> Those [inhabitants], who remain in the islands may preserve their citizenship in Denmark by [declaring their intent to preserve such]; in default of which declaration they shall be held to have renounced it, and to have accepted citizenship in the United States . . . .
>
> The civil rights and the political status of the inhabitants of the islands shall be determined by the Congress, subject to the stipulations contained in [this Treaty].

Convention Between the United States & Denmark art. 6, 39 Stat. 1706 (ratified January 16, 1917)(available at V.I. CODE ANN. 27-35, Historical Documents (1995) (preceding V.I. CODE ANN. tit. 1)). An additional proviso bearing on this issue was added by the Senate in its resolution of ratification of the Convention, by which the Senate's advice and consent was conditioned on the

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according to the Supreme Court.

> [Alaska] was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens. It was on the American Continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Phillipines and Porto Rico presents . . . .

Balzac, 258 U.S. at 309 (emphasis added) ("refer[ring] to the difficulties in *Dorr*" and the Phillipines); *see Downes v. Bidwell*, 182 U.S. at 287 (dealing with Puerto Rico: "possession[] . . . inhabited by *alien races*, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice") (emphasis added).

understanding that the Convention could not be construed as imposing any duty or responsibility on the United States for the management of funds or property of the Church of Denmark. *See id.*, 39 Stat. at 1715 (following art. 12). The Senate's ratifying resolution also required an exchange of notes "so as to make plain that this condition is understood and accepted by the two Governments, the purpose hereof *being to bring the said Convention clearly within the Constitutional powers of the United States* with respect to church establishment and freedom of religion." *See id.*, 39 Stat. at 1715-16 (emphasis added).

In discussing the interrelated yet distinct concepts of organization under section 1891 and incorporation, this Court in *Richardson* acknowledged that the Court of Appeals for the Third Circuit had declared the Virgin Islands to be an unincorporated territory in 1928. *See Soto v. United States*, 1 V.I. at 547, 273 F. at 633 (holding that a criminal defendant in the Virgin Islands has the fundamental rights to be heard and to confront and cross-examine witnesses against him, despite the serious effect of such a decision on the administration of justice under the local laws). *Richardson* nevertheless concluded that its holding was consistent with *Soto* because the court in *Soto* had not addressed section 1891 and its effect on the Virgin Islands as an *organized* territory. *See Richardson*, 1 V.I. at 333-34,

1936 U.S. Dist. LEXIS at *40-41; *accord Smith v. Government of the Virgin Islands*, 6 V.I. 136, 147, 375 F.2d 714, 720 (3d Cir. 1967) ("The question whether the Virgin Islands were at [the time of *Soto*] an organized or unorganized territory was not relevant to the issue and was not discussed . . . ."); *Hayes*, 392 F. Supp. at 49 ("Since the Third Circuit in both the *Soto* and *Allen* cases, handed down in 1921 and 1931 respectively, failed to consider both that an unincorporated territory may nonetheless be organized, and the potential applicability of Section 1891 to these islands, I must find that the precedential impact of these decisions is greatly diminished." (citing *Smith*, 6 V.I. at 144)).

Richardson next distinguished the result in *Balzac* on the ground that the arguments used by the Supreme Court to justify not applying section 1891 to extend the Constitution to Puerto Rico did not apply to the Virgin Islands. *Richardson*, 1 V.I. at 335, 1936 U.S. Dist. LEXIS at *336 (citing 54 CONG. REC. 3647-3851, 3687-89, 4826 for the proposition that the Virgin Islands' status was, at the time of acquisition, "very much like that of Alaska"). To further distinguish the Virgin Islands from Puerto Rico, this Court noted that "the Treaty between the United States and Denmark . . . under which we acquired the Virgin Islands [] shows that the United States intended to have the Constitution of the United States apply to the Virgin Islands. *Id.* (citing the

Senate reservations, which were incorporated into the treaty).[15]

Richardson has never been overruled. *See Hayes v. Government of the Virgin Islands*, 392 F. Supp. at 49. In its arguments in support of its motion to dismiss, the United States simply cites *Balzac* for the proposition that the Virgin Islands' unincorporated status determines the applicability of the Constitution to inhabitants of the Virgin Islands, ignoring the recognized effects of the concept of organization on the Virgin Islands. Given this Court's holding in 1936 that the Virgin Islands constituted an organized territory at the time they were acquired and thus subject to section 1891 and thereby the Constitution, the questions raised by the plaintiff in this action are not so easily dismissed insofar as they implicate Congress's authority to enact any law that is incompatible with the Constitution, including its designation of the Virgin Islands for the first time as an unincorporated territory under the Revised Organic Act of 1954. *See* Revised Organic Act § 2.

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[15] Although not discussed in detail in *Richardson*, but as discussed *supra* at 26-27, the Senate required an exchange notes "so as to make plain that this condition is understood and accepted by the two Governments, the purpose hereof *being to bring the said Convention clearly within the Constitutional powers of the United States* with respect to church establishment and freedom of religion." *See* Convention, 39 Stat. 1706, 1715 (emphasis added). Congress thus clearly acknowledged that the First Amendment of the Constitution governed the new territory and circumscribed its Article IV powers, even though this radically altered the long-held traditions, customs and institutions of the people already living in the new United States territory. *Richardson* concluded from this that the Constitution applied in all respects.

Applicability of the Doctrine of Unincorporation to the Virgin Islands

The plaintiff here asserts that the Constitution applies *of its own force*, a proposition that has long been "settled" by the seemingly overpowering doctrine of unincorporation. At the outset, I question whether there is any continuing justification, or even any justification in the first place, to apply to the Virgin Islands a rationale premised in any way on the notion that people living in territories are or were "of alien races" unaccustomed to "Anglo-Saxon" principles of government.[16] At no time has Congress, the Supreme Court, or other court ever explained why the doctrine of unincorporation applies to this territory, which came with a fully functioning tripartite government and has continued to operate as a fully Americanized system of government for over eighty years. Nor has the United States, in its motion to dismiss, offered any rationale to apply the *Insular Cases* to the Virgin Islands. Moreover, even if I were compelled to accept that this long-standing Supreme Court authority would preclude a finding in favor of the plaintiff, developments in international law raise substantial questions

[16] Until presented with the issues raised in this case, I have accepted the doctrine of unincorporation and Congress's unilateral power under Article IV to determine the civil rights of United States citizens residing in the Virgin Islands. *See, e.g., Government of the Virgin Islands ex rel. Robinson v.* Schneider, 893 F. Supp. 490, 495 (D.V.I. 1995); *United States v. Hyde*, 29 V.I. 106, 1993 U.S. Dist. LEXIS 20047 (D.V.I. 1993).

about the continued application of the *Insular Cases* to deny Virgin Islanders the same rights afforded all United States citizens residing in the fifty states.

The Insular Cases and International Law

Over the years since the first *Insular Cases* in 1901, the United States has willingly and advisedly assumed certain duties and obligations under international law that may bear on the continued viability of the *Insular Cases* in general and the application of the unincorporation doctrine to the Virgin Islands and its residents in particular. The Territory of the United States Virgin Islands is one of only seventeen territories remaining in the world today that are classified under international law as "non-self-governing territories." *See* Information from Non-Self-Governing Territories transmitted under Article 73e of the Charter of the United Nations, U.N. GAOR, 56th Sess., U.N. Doc. No. A/56/67 (May 8, 2001) ["Information from Non-Self-Governing Territories"].[17] The non-self-governing territory of the Virgin Islands is thus the subject of a continuing United Nations campaign to eradicate colonialism as a matter of international human rights. *See* G.A. Res. 146, U.N. GAOR, 55th Sess., Supp. No. 23, U.N. Doc. A/Res/55/146 (2001)

[17] This document and other United Nations documents relating to non-self-governing territories are collected at http://www.un.org/Depts/dpi/decolonization/main.htm.

(announcing the Second International Decade Dedicated to the Eradication of Colonialism). As the "administering Power" over the Virgin Islands and a member of the United Nations, the United States has assumed the United Nations Charter obligation "to promote to the utmost . . . the well-being of the inhabitants of the [Virgin Islands], and, to that end . . . to develop self-government." U.N. CHARTER Art. 73e.[18] The present internal governmental structure of the Territory of the Virgin Islands, with its elected unicameral legislature, elected governor, and separate court for local matters, is purely a creature of the United States Congress, enacted by representatives selected in elections in which the people of the Virgin Islands have no vote. The Congress retains unilateral power over the Virgin Islands pursuant to the Territorial Clause. *See, e.g.*, Revised Organic Act § 8, 48 U.S.C. § 1574(c) ("[T]he [Virgin Islands] legislature shall have power . . . to amend, alter, modify, or repeal any local law or ordinance . . . and to enact new laws . . . subject to the power of Congress to annul any such Act of the

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[18] So long as the Virgin Islands remains a non-self-governing territory, the United States is required by Article 73e "to transmit regularly to the Secretary-General for information purposes . . . statistical and other information of a technical nature relating to economic, social, and educational conditions in the [Virgin Islands]." U.N. CHARTER art. 73e. On March 31, 2001, the United States submitted its 73e report on the Virgin Islands to the Secretary-General for the period covering 2000-2005. *See* Information from Non-Self-Governing Territories, U.N. GAOR, 56th Sess, U.N. Doc. No. A/56/67 (May 8, 2001) (annex).

legislature.").

In 1960, the United Nations General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples, declaring, *inter alia*, that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." G.A. Res. 1514 (XV), para. 2, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, 67, U.N. Doc. A/4684 (1960) ["Declaration"]. Paragraph 5 of the Declaration further states that "[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom." *Id.* para. 5. Two years later, after "not[ing] with regret that, with few exceptions, the provisions contained in [paragraph 5] of the Declaration have not been carried out," the General Assembly established a Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (often referred to today as the Special

Committee of 24) and charged it with the tasks of monitoring the implementation of the Declaration and reporting to the Fourth Committee of the General Assembly on the progress of decolonization efforts. *See* G.A. Res. 1654 (XVI), Nov. 27, 1961, U.N. GAOR, Supp. No. 17, 65, U.N. Doc. A/5100 (1961).

A member state, such as the United States, will be relieved of its obligation to transmit information under Article 73e only when its territory, such as the Virgin Islands, manifests one or more of three forms of self-governance:

> (a) Emergence as a sovereign independent state;
> (b) Free association with an independent state; or
> (c) Integration with an independent state.

G.A. Res. 1541 (XV), Annex, Principle VI, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960).[19] Clearly, the United States has not transferred all power, without reservation, to the Virgin Islands, as required under the Declaration. Because the Territory of the Virgin Islands is not a sovereign,

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[19] Principle VII, for example, elaborates on the third form of self-government:

> Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

G.A. Res. 1541 (XV), Annex, Principle VII, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960).

independent state, nor is it in free association with or integrated with the United States, it is not self-governing, remains on the list of non-self-governing territories, and continues to be a subject of the Special Committee's decolonization efforts and Article 73e reports from the United States to the Secretary-General. *See* Information from Non-Self-Governing Territories, U.N. GAOR, 56th Sess., U.N. Doc. No. A/56/67 (May 8, 2001) (annex).

In 1992, the United States voluntarily agreed to do much more than merely report the statistics of the Virgin Islands under Article 73e. Although it took the United States almost thirty years to assume these obligations, it finally did so when the Senate ratified the International Covenant on Civil and Political Rights ["ICCPR"] in September 1992. *See* ICCPR, adopted Dec. 16, 1966, S. Treaty Doc. 95-2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, entered into force for the United States Sept. 8, 1992). The ICCPR contains specific language requiring States Parties to afford their citizens the right to vote, *see id.* art. 25,[20] and to afford the people of non-self-

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[20] Article 25 provides:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth *or other status*] and without unreasonable restrictions:

(continued...)

governing territories such as the Virgin Islands the right to self-determination, *see id.* art. 1, paras. 1 & 3.[21] Although the Senate characterized the ICCPR as "non-self-executing," *see* Advice and Consent, 138 CONG. REC. S4781-01, 4784 (daily ed. Apr. 2, 1992) (declaring the treaty non-self-executing), the United States nevertheless clearly and voluntarily undertook certain affirmative obligations as a State Party to the International Covenant on Civil and Political Rights. In particular, Article 1, paragraph 3 states:

> The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, *shall promote the realization of the right of self-determination*, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Id. art. 1, para. 3 (emphasis added).[22] In addition, the United

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[20](...continued)
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

ICCPR art. 25.

[21] Article 1, paragraph 1 provides: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." ICCPR art. 1, para. 1.

[22] The Committee further commented on this paragraph:

(continued...)

States agreed to the obligations of Article 2, paragraph 2 to take the necessary, affirmative steps to implement the provisions of the ICCPR:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Id. art. 2, para. 2. The United States assumed the obligations of both Articles 1 and 2, without reservation, and further unreservedly entered into the understanding

> that this Covenant *shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein*, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

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[22](...continued)
Paragraph 3, in the Committee's opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. . . . [A]ll States Parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. . . . The reports [required under Article 41] should contain information on the performance of these obligations and the measures taken to that end.

ICCPR art. 1, para 3, committee comment 12.6.

Advice and Consent, 138 CONG. REC. S4781-01, 4783 (daily ed. Apr. 2, 1992) (Understanding 5) (emphasis added).

In sum, the United States has willingly and voluntarily taken upon itself the ongoing obligations of Articles 1, 2, and 25 of the ICCPR, and of Understanding 5, to implement affirmatively the International Covenant on Civil and Political Rights by "promoting the realization of the right to self-determination" in the Virgin Islands and to provide a mechanism whereby citizens in the Virgin Islands can vote in federal elections, or at the very least, be afforded all rights under the Constitution.[23] Whatever power this Court has to enforce these provisions of the ICCPR, including the United States' affirmative understanding and acceptance of its obligation to promote actively the realization of the right to self-determination in the Virgin Islands, these provisions appear to conflict with the unincorporation doctrine of the *Insular Cases* and the application of that doctrine and those cases to this Territory.

Supplemental Briefing

Considering the complexity and seriousness of the matters at hand, the parties' submissions and arguments thus far presented

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[23] The Unites States is not a party to Optional Protocol 1, which specifically would allow a person aggrieved by violations of the covenant to communicate directly with the Committee on Human Rights. *See* Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171, 302-46; G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966).

do not adequately explore the premises and authority upon which the United States' motion relies. Accordingly, the Court will order supplemental briefing on the questions set below, framed with the preceding discussion in mind.

1. Was the Virgin Islands an organized territory at the time it was acquired from Denmark, as was held by this Court in *Richardson*? *See Kopel v. Bingham*, 211 U.S. 468, 475 (1909) (defining an "organized" territory as "[a] portion of the country not included within the limits of any State, and not yet admitted as a State into the Union, but organized under the laws with a separate legislature under a territorial governor and other officers appointed by the President of the United States").

2. If, as the Court in *Richardson* held, the Constitution has applied to the Virgin Islands since the time of its acquisition in 1917, then what was the effect of section 1891 with respect to automatic United States citizenship to persons born in the Virgin Islands? *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."). If section 1891 extended the first sentence of the Fourteenth Amendment to the Virgin Islands in 1917, would title 8, section 1406 of the United States Code then be a nullity insofar as it purports to confer United States citizenship to persons born in the Virgin Islands?

3. If section 1891 extended the Constitution to the Virgin Islands, could the Senate's ratification of the Convention between the United States and Denmark repeal by implication section 1891 as it may have applied to the organized territory of the Virgin Islands? *See* Convention art. 6 ("The civil rights and the political status of the inhabitants of the islands shall be determined by Congress, subject to the stipulations contained in the present convention.").

4. Does the Constitution authorize the United States to acquire and keep a territory *in perpetuity* as

"unincorporated," without any apparent intention to integrate or incorporate that territory and thereby keeping those United States citizens who inhabit the territory in a state of perpetual pupilage, dependence, and inequality?

5. How do the international obligations of the United States, and in particular Articles 1 and 2 of the ICCPR, affect the analysis in this case? Is the United States under an affirmative obligation to execute the ICCPR? Is this Court bound by Congress's declaration that Articles 1 through 27 of the ICCPR are non-self-executing? Does this mean that these obligations are not judicially enforceable?

6. In light of the relevant provisions of the ICCPR and the fact that Virgin Islanders have not yet exercised their right to determine for themselves their relationship to the United States pursuant to Principle VI of Resolution 1541 (XV), would it be proper for this Court to rely on the *Insular Cases* as authority for granting, insofar as relevant, the United States' motion to dismiss?

7. The Supreme Court recently reiterated that an *individual* citizen does not have the right to vote for the President, *see Bush v. Gore*, 531 U.S. 98 (2000), even though it has elsewhere hailed the right to vote as "the essence of a democratic society," *Reynolds v. Sims*, 377 U.S. 533, 555 (1963). The Court's reasoning in *Bush v. Gore*, and indeed the structure of the Constitution itself, presumes that an individual citizen will be represented in a presidential election by her state electors, in a manner directed by her (elected) state legislature. *See* U.S. CONST. art. II. In this way, the Constitution grants every United States citizen residing in a state at the very minimum an indirect voice in the presidential election. In contrast, citizens residing in an unincorporated territory, as the Virgin Islands are presently categorized, do not even have an indirect voice in presidential elections, and further, have no vote in the Congress that might consider amending the Constitution to rectify the discriminatory impact.

   Does such an arrangement violate international law in

that it prevents, by Constitutional structure coupled with the unilateral power of Congress, the United States citizen residing in the Virgin Islands from voting for those who make the laws that directly affect her? *See* ICCPR art. 25. If, as held by the district court in *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140 (D.P.R. 2000), the non-self-executing provisions of the ICCPR cannot be enforced by a federal court, has the United States violated international law by persistently failing to implement the ICCPR?

8. What are the obligations of the United States, as the "administering Power," to educate and inform the people of the Virgin Islands of their status options under international law? *See, e.g.*, Dissemination of information on decolonization, G.A. Res. 55/145, U.N. GAOR, 55th Sess. (March 6, 2001).

9. Does the present Congressional enactment authorizing a constitutional convention, Pub. L. 94-584 (90 Stat. 2809 [90 Stat. 2899]) [48 U.S.C. note preceding §§ 1391 and 1541], satisfy the obligations of Article 2 of the ICCPR as a "necessary step[], in accordance with its constitutional processes . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the [ICCPR]"?

10. Finally, *Richardson* and international law aside, what is the rationale for applying the doctrine of unincorporation to the U.S. Virgin Islands?

CONCLUSION

For the reasons stated, the Court will order supplemental briefing on the questions identified above.

ENTERED this 15th day of October, 2001.

FOR THE COURT

_____/s/_____
THOMAS K. MOORE
DISTRICT JUDGE

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

KRIM M. BALLENTINE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civ. No. 1999-130**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

ATTORNEYS:

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For the plaintiff,

Joycelyn Hewlett, Esq.
St. Thomas, U.S.V.I.
For the defendant.

ORDER

For the reasons stated in the accompanying Memorandum of even date, it is hereby

ORDERED that the parties shall file, no later than November 13, 2001, supplemental briefing addressing the following questions:

1. Was the Virgin Islands an organized territory at the time it was acquired from Denmark, as was held by this Court in *Richardson*? *See Kopel v. Bingham*, 211 U.S. 468, 475 (1909) (defining an "organized" territory as "[a] portion of the country not included within the limits of any State, and not yet admitted as a State into the Union, but organized under the laws with a separate legislature under a territorial governor and other officers appointed by the President of the United States").

2. If, as the Court in *Richardson* held, the Constitution has applied to the Virgin Islands since the time of its acquisition in 1917, then what was the effect of section 1891 with respect to automatic United States citizenship to persons born in the Virgin Islands? *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."). If section 1891 extended the first sentence of the Fourteenth Amendment to the Virgin Islands in 1917, would title 8, section 1406 of the United States Code then be a nullity insofar as it purports to confer United States citizenship to persons born in the Virgin Islands?

3. If section 1891 extended the Constitution to the Virgin Islands, could the Senate's ratification of the Convention between the United States and Denmark repeal by implication section 1891 as it may have applied to the organized territory of the Virgin Islands? *See* Convention art. 6 ("The civil rights and the political status of the inhabitants of the islands shall be determined by Congress, subject to the stipulations contained in the present convention.").

4. Does the Constitution authorize the United States to acquire and keep a territory *in perpetuity* as "unincorporated," without any apparent intention to integrate or incorporate that territory and thereby keeping those United States citizens who inhabit the territory in a state of perpetual pupilage, dependence, and inequality??

5. How do the international obligations of the United States, and in particular Articles 1 and 2 of the ICCPR, affect the analysis in this case? Is the United States under an affirmative obligation to execute the ICCPR? Is this Court bound by Congress's declaration that Articles 1 through 27 of the ICCPR are non-self-executing? Does this mean that these obligations are not judicially enforceable?

6. In light of the relevant provisions of the ICCPR and the fact that Virgin Islanders have not yet exercised their right to determine for themselves their relationship to the United States pursuant to Principle

VI of Resolution 1541 (XV), would it be proper for this Court to rely on the *Insular Cases* as authority for granting, insofar as relevant, the United States' motion to dismiss?

7. The Supreme Court recently reiterated that an *individual* citizen does not have the right to vote for the President, *see Bush v. Gore*, 531 U.S. 98 (2000), even though it has elsewhere hailed the right to vote as "the essence of a democratic society," *Reynolds v. Sims*, 377 U.S. 533, 555 (1963). The Court's reasoning in *Bush v. Gore*, and indeed the structure of the Constitution itself, presumes that an individual citizen will be represented in a presidential election by her state electors, in a manner directed by her (elected) state legislature. *See* U.S. CONST. art. II. In this way, the Constitution grants every United States citizen residing in a state at the very minimum an indirect voice in the presidential election. In contrast, citizens residing in an unincorporated territory, as the Virgin Islands are presently categorized, do not even have an indirect voice in presidential elections, and further, have no vote in the Congress that might consider amending the Constitution to rectify the discriminatory impact.

   Does such an arrangement violate international law in that it prevents, by Constitutional structure coupled with the unilateral power of Congress, the United States citizen residing in the Virgin Islands from voting for those who make the laws that directly affect her? *See* ICCPR art. 25. If, as held by the district court in *Igartua de la Rosa v. United States*, 107 F. Supp. 2d 140 (D.P.R. 2000), the non-self-executing provisions of the ICCPR cannot be enforced by a federal court, has the United States violated international law by persistently failing to implement the ICCPR?

8. What are the obligations of the United States, as the "administering Power," to educate and inform the people of the Virgin Islands of their status options under international law? *See, e.g.*, Dissemination of information on decolonization, G.A. Res. 55/145, U.N. GAOR, 55th Sess. (March 6, 2001).

9. Does the present Congressional enactment authorizing a

constitutional convention, Pub. L. 94-584 (90 Stat. 2809 [90 Stat. 2899]) [48 U.S.C. note preceding §§ 1391 and 1541], satisfy the obligations of Article 2 of the ICCPR as a "necessary step[], in accordance with its constitutional processes . . . to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the [ICCPR]"?

10. Finally, *Richardson* and international law aside, what is the rationale for applying the doctrine of unincorporation to the U.S. Virgin Islands?

ENTERED this 15th day of October, 2001

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk

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